Filed 10/7/04 In re Robin D. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ROBIN D., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. ROBIN D., Defendant and Appellant.	B172805 (Los Angeles County Super. Ct. No. YJ24378)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephanie Davis, Judge. Remanded with directions and affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Myung J. Park, Deputy Attorney General, for Plaintiff and Respondent.

The juvenile court sustained a petition alleging that appellant Robin D. drove while having a .08 or higher blood alcohol concentration in violation of Vehicle Code section 23152, subdivision (b), drove while under the influence of alcohol or drugs in violation of section 23152, subdivision (a) and drove without a valid driver's license in violation of section 12500, subdivision (a), all misdemeanors. The court found that appellant was a person described by Welfare and Institutions Code section 602, adjudged him to be a ward of the court, and placed him on home probation for a period not to exceed eight months. The trial court imposed a $390 fine pursuant to Vehicle Code section 23536, subdivision (a) and a $50 restitution fine pursuant to Welfare and Institutions Code section 602.

Appellant appeals from the orders sustaining the petition and adjudging him to be a ward of the court, contending that there is insufficient evidence to support the trial court's finding that he drove a vehicle while intoxicated and further contending that the trial court erred in imposing a fine pursuant to Vehicle Code section 23536. We remand this matter for a determination of appellant's ability to pay, and to provide his parents an opportunity show that they are unable to pay. We affirm the juvenile court's orders in all other respects.

Facts

On July 3, 2003, at about 5:00 a.m., California Highway Patrol Officer Christopher Reeves and his partner Officer Castro responded to a report of a pedestrian walking on the westbound side of the 90 Freeway. As they drove west on the 90 Freeway, they did not see any pedestrians. They did see a gray Toyota Camry parked on the shoulder of the freeway just west of Mesmer Avenue. The car was registered to Gary D., appellant's father.

The officer stopped to investigate the Camry. They noticed that the car's lights were on and the front passenger door open. When he got closer, Officer Reeves saw appellant's head and shoulders hanging out of the open door. Appellant appeared to be

asleep. He had vomit on his hair, face, shirt and pants, and had urinated on his clothing. Appellant, who was 14 years old, did not have a driver's license.

The hood of the car was warm. The key was in the ignition, but the engine was not running. There was a strong smell of alcohol in the car, but no sign of alcohol.

Officer Reeves was unable to wake appellant up. The officers dragged him out of the car by his arms and carried him to the patrol car. The officers drove appellant to UCLA Medical Center. They did not see any pedestrians on the drive to the UCLA.

At the Medical Center, appellant was unable to walk. His eyes were bloodshot and watery. He did not appear to understand what was going on. At 6:35 a.m., a nurse drew a blood sample and gave it to Officer Reeves. The blood was analyzed later by the Los Angeles County Sheriff's Department. The blood had a .17 blood-alcohol concentration ("BAC").

At about 8:00 a.m., the officers spoke with appellant. Appellant was awake and coherent. He said that he had been at a friend's house in Tarzana the night before. He drank four or five glasses of vodka, beginning at about 1:30 a.m. He had been trying to get home on the 90 freeway. He told the officers that he was driving.

Appellant testified in his own behalf. He does not believe that he drove home from Tarzana. When he told the officers that he had been driving that night, he meant only that he had driven to Tarzana.

Appellant also offered the testimony of Dwayne Beckner, a criminalist who works primarily in the area of forensic alcohol testing. Beckner estimated that if appellant's blood alcohol level was going up at the time he was tested, it could have been in the .01 to .03 range when he was found by the officers. If it was going down, it would have been higher than .17 when he was found. Beckner opined that there was no way to know which direction the level was going, and so no way to determine what that level was at or before 5:00 a.m.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is no evidence to show that he drove the car to the 90 Freeway, and assuming that he drove the car, no evidence to show that he was intoxicated while doing so. We see substantial evidence of both.

In reviewing the sufficiency of the evidence, "courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]'" (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261.)

The standard of review is the same when the prosecution relies on circumstantial evidence to prove guilt. (*People* v. *Rodrigues* (1999) 20 Cal.4th 1, 11.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People* v. *Thomas* (1992) 2 Cal.4th 489, 514, citing *People* v. *Bean* [(1988)] 46 Cal.3d [919] at pp. 932-933.)

Here, appellant's admission to the officers that he was driving the car home is ample evidence to support a finding that he drove the car to the 90 freeway. Although appellant testified at trial that he did not try to drive home, we view the evidence in the light most favorable to the verdict and resolve conflicts in the evidence in favor of the fact-finder's decision. (*People* v. *Mincey* (1992) 2 Cal.4th 408, 432; *People* v. *Gonzalez* (2004) 116 Cal.App.4th 1405, 1413.)

Circumstantial evidence also reasonably justifies the trial court's finding that appellant drove the car to the 90 freeway. Although the CHP received a report of a pedestrian in the area of appellant's parked car, the officers who went to the area did not see any pedestrians. There was no one in or near the car except appellant. There was no dispute that appellant had driven the car earlier in the evening, and the car was registered

to his father. The car's lights were on, the key was in the ignition and the hood was still warm, suggesting that the car had been recently stopped. It is reasonable to infer from this evidence that appellant drove the car to the location. Further, even if we were to find that it was equally reasonable to infer from the report of a pedestrian that another person had been driving the car and had parked it and walked away for some reason, this would not warrant reversal of the judgment. (*People* v. *Thomas*, *supra*, 2 Cal.4th at p. 514.)

Appellant's BAC at 6:35 a.m. was .17. Vehicle Code section 23152, subdivision (b), creates a rebuttable presumption that a person who has a .08 BAC within three hours after driving had that same BAC when driving. Section 23152, subdivision (b), is not limited to situations where there is direct evidence of the time of driving. It also applies when there is only circumstantial evidence of the time. (*Komizu* v. *Gourley* (2002) 103 Cal.App.4th 1001, 1008-1010.)

Here, it was a cool night and the car's hood was still warm when the officers reached the car at about 5:00 a.m., so it is reasonable to infer that the car had been recently parked. Appellant's blood was drawn at 6:35 a.m., 90 minutes after the officers first saw the car. Thus, it was reasonable for the court to apply the presumption of Vehicle Code section 23152 to find that appellant had a BAC of .08 while driving. Nothing in the testimony of appellant's expert Beckner rebutted that presumption.[1]

Further, appellant was unconscious and incoherent at 5:00 a.m. Two to three hours later, when he spoke with the officers, he was conscious and coherent. It is thus reasonable to infer that appellant's BAC was dropping during that period.

2. Fine

Appellant contends that the trial court erred in failing to consider whether he had the ability to pay the $390 fine specified in Vehicle Code section 23536, subdivision (a),

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1 Beckner opined generally that more information than the BAC at the time of testing is needed to accurately determine the BAC at the earlier time of driving. While this is a criticism of the presumption, it does not rebut it. The purpose of the presumption is undoubtedly to eliminate the People's need to offer proof of the facts described by Beckner such as precise time and amount of alcohol consumed.

for violations of Vehicle Code section 23152. The trial court believed that the fine was mandatory and did not consider appellant's ability to pay. We find that the trial court should have considered appellant's ability to pay.

Welfare and Institutions Code section 730.5 provides: "When a minor is adjudged a ward of the court on the ground that he or she is a person described in Section 602, in addition to any of the orders authorized by Section 726, 727, 730, or 731, the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. Section 1464 of the Penal Code applies to fines levied pursuant to this section."

Respondent contends that since section 730.5 states the court "may" levy a fine, the section must only apply to discretionary adult fines, not to mandatory ones. Since the Vehicle Code section 23536 fine is mandatory, respondent concludes that Welfare and Institutions section 730.5 does not apply to it. Respondent is mistaken.

Fines which can or must be imposed on an adult convicted of violating the Penal Code or the Vehicle Code have no direct application to minors who are adjudged wards of the court. It is the conviction which triggers the fine. Here, for example, Vehicle Code section 23536 requires a fine for "any person [who] is convicted of a first violation of section 23152." Juveniles, unlike adults, do not suffer convictions for a crime.

Welfare and Institutions Code section 730.5 permits a juvenile court to impose fines on juveniles who have not suffered a "conviction" but who have been found by the juvenile court to have committed an offense which could result in a fine for an adult. Since the trial court did not consider appellant's ability to pay, this matter must be remanded for a hearing on that subject.

Appellant contends that on remand, his parents should not be found to be jointly liable for the fine. We do not agree.

Welfare and Institutions Code section 730.7, subdivision (a), provides in pertinent part: "In a case where a minor is ordered to make restitution to the victim or victims, *or the minor is ordered to pay fines and penalty assessments under any provision of this*

code, a parent or guardian who has joint or sole legal and physical custody and control of the minor shall be rebuttably presumed to be jointly and severally liable with the minor . . . subject to the court's consideration of the parent's or guardian's ability to pay." (Emphasis added.)

The authority to impose a fine on appellant as a juvenile came from Welfare and Institutions Code section 730.5. Vehicle Code section 23536 provides only the upper limit of the fine that could be imposed. Thus, Welfare and Institutions section 730.7 does apply to appellant's fine. On remand, appellant's parents should be given an opportunity to show the court that they are unable to pay the fine. If no such showing is made, appellant's parents are jointly and severally liable for any fine imposed on appellant.

Disposition

This matter is remanded for a hearing on appellant's ability to pay the fine specified in Vehicle Code section 23536, subdivision (a). Appellant's parents must be given opportunity to show that they are unable to pay any fine. The trial court's orders are affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P.J. MOSK, J.